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PANG CODAN RUBBER (M) SDN BHD v. VIJAY PERUMAL

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY SUPPIAH J
[CIVIL APPEAL NO: BA-12A-1-01-2019]
12 JULY 2019

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CIVIL PROCEDURE: *Striking out – Application to strike out action – Charge for theft against employee withdrawn and granted order of discharge not amounting to acquittal ('DNAA') granted – Employee commenced action for damages for malicious prosecution against former employer – Whether employee's action ought to be struck out – Whether action could be taken against former employer when charge was by Public Prosecutor – Whether former employer instrumental in action against employee – Whether grant of DNAA sufficient to establish element of cause of action in malicious prosecution – Rules of Court 2012, O. 18 r. 19*

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The defendant company held a domestic inquiry on a complaint that the plaintiff, a quality assurance assistant engineer, had stolen two gadgets worth about RM42. Soon thereafter, the plaintiff resigned and the defendant's representative lodged a police report alleging that the plaintiff had removed the two gadgets from the production department without permission or authorisation. The plaintiff was remanded for four days by the police and

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upon expiry of the remand, the plaintiff was prosecuted for theft under s. 381 of the Penal Code. However, the charge was subsequently withdrawn and the plaintiff was granted on order of discharge not amounting to an acquittal ('DNAA') by the Magistrate's Court. The plaintiff thereafter instituted an action against the defendant at the Sessions Court for damages for malicious

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prosecution. The defendant applied under O. 18 r. 19 of the Rules of Court 2012 to strike out the action on the grounds that: (i) it was not the defendant who instituted the prosecution against the plaintiff; and (ii) the prosecution did not terminate in the plaintiff's favour as he was not given an acquittal but an order of DNAA. The Sessions Court dismissed the application and hence,

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this appeal.

Held (dismissing appeal):

(1) The defendant who falsely, maliciously and without reasonable and probable cause made a complaint to a police officer could be held to be the prosecutor for the purposes of a claim for malicious prosecution. If

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there is evidence that the defendant was actively instrumental in putting the law in force, even if the Public Prosecutor is the prosecutor, the defendant can be held liable as the person responsible for bringing about the prosecution if his deception misleads the discretion of the nominal prosecutor. Therefore, the defendant's argument that the plaintiff's

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claim was bound to fail on the first ground, was baseless. (paras 12 & 15)

(2) It is a well-established rule that the court would, as a matter of practice, grant an order of DNAA when the prosecution withdraws a charge or elects not to offer any further evidence in a criminal case before the commencement of the trial. It is only in exceptional cases that an acquittal is ordered without hearing evidence. It was therefore, not the fault of the plaintiff that he was given a DNAA. As the charge against the plaintiff was withdrawn and he was given a DNAA, it was sufficient to establish the element of the cause of action in malicious prosecution that required prosecution proceedings to have terminated in the plaintiff's favour. In the circumstances, the plaintiff ought to be allowed to maintain this action. It was improbable that the prosecution would have withdrawn the charge after having charged him in the court without good reason. (paras 19 & 23)

Case(s) referred to:
Beckett v. New South Wales [2013] 5 LRC 549 ***(foll)***
KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation) [2018] 8 CLJ 423 CA ***(refd)***
Learnergy Sdn Bhd & Anor v. Abdul Jalil Othman [2018] 1 LNS 1055 HC ***(refd)***
Martin v. Watson [1995] 3 All ER 559 ***(refd)***
Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***
Rees & Others v. Commissioner of Police for the Metropolis [2017] EWHC 273 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 254
Federal Constitution, art. 145(3)
Penal Code, ss. 199, 381
Rules of Court 2012, O. 18 r. 19

For the plaintiff/respondent - Tharma Kumar Jaya Kumar; M/s Nazrin Nasir T Anand & Co
For the defendant/appellant - Harikannan Ragavan & Amanda Loh Li Xian; M/s Jayadeep Hari & Jamil

Reported by S Barathi

JUDGMENT

SM Komathy Suppiah J:

The Appeal

[1] The question that lies at the heart of this appeal is whether the termination of prosecution proceedings by the grant of an order of discharge not amounting to an acquittal ("DNAA") is sufficient to establish the element of the cause of action in malicious prosecution that requires proceedings to have terminated in the plaintiff's favour.

A **Background Facts**

[2] The facts relevant to this appeal are as follows. The plaintiff was employed as a quality assurance assistant engineer with the defendant company for about nine years.

B **[3]** On 30 May 2017, the defendant company held a domestic inquiry on a complaint that the plaintiff had stolen two gadgets worth about RM42. The plaintiff resigned from the company soon thereafter. On 12 July 2017, the defendant's representative lodged a police report alleging the plaintiff had removed the two gadgets from the production department without permission or authorisation. In consequence, on 15 July 2017, the plaintiff C was remanded by the police for four days and upon the expiry of the remand, was prosecuted in the Selayang Magistrate's Court for theft under s. 381 of the Penal Code.

[4] On 26 September 2017, the learned Deputy Prosecutor withdrew the D charge against the plaintiff. He was granted an order of DNAA by the court. The withdrawal of the charge was consequent upon a written representation made to the Attorney General's Chambers by the plaintiff's lawyers.

[5] The plaintiff then instituted this action against the defendant for damages for malicious prosecution. The defendant promptly applied under E O. 18 r. 19 of the Rules of Court 2012 to strike out the action on the ground that it was bound to fail on two principal grounds. First, it was not the defendant who instituted the prosecution against the plaintiff; and, secondly, that the prosecution did not terminate in the plaintiff's favour as he was not given an acquittal but an order of DNAA. The Sessions Judge was not F persuaded and dismissed the application, and hence, this appeal.

Legal Principles – Malicious Prosecution

[6] The defendant raised the same arguments as in the court below. Before I proceed to consider the merits of the arguments raised by the defendant in support of the appeal, I propose to set out the law.

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[7] It is well-established in the Federal Court cases of *Rawther v. Abdul Kareem* [1966] 1 LNS 154 and *KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation)* [2018] 8 CLJ 423; [2018] 4 MLRA 133 that in an action for malicious prosecution, the onus is on the plaintiff to prove that:

H (i) he was prosecuted by the defendant, that is to say, that it was the defendant who set the criminal law in motion against him;

(ii) the prosecution was determined in his favour;

(iii) it was without reasonable and probable cause;

I (iv) it was malicious; and

(v) that he suffered actionable damage

Whether The Plaintiff Was Prosecuted By The Defendant

[8] It was the defendant's contention that the Sessions Judge was in error in failing to find that the plaintiff's claim was bound to fail as there was no real prospect of the latter establishing that he was prosecuted by the defendant. The decision to prosecute the plaintiff, it was argued, was not taken by the defendant but by the Attorney-General/Public Prosecutor who has the conduct of all criminal prosecutions in the country by virtue of art. 145(3) of the Federal Constitution. Thus, the defendant cannot in law be held to be a prosecutor.

[9] The position taken by the defendant does not accord with decisions made locally and in other jurisdictions. In *Rawther* (*supra*), the plaintiff was charged in the Magistrate's Court for making a false affidavit under s. 199 of the Penal Code and acquitted and discharged at the conclusion of the trial. He then commenced civil proceedings against the defendant for malicious prosecution. By his defence, the defendant denied that the plaintiff was arrested at his instance and averred that the prosecution of the plaintiff was not initiated by him or his solicitors but the Public Prosecutor. The civil action was set down for hearing. The defendant did not attend court on that date. The court proceeded in his absence and held that on the evidence, the plaintiff was entitled to succeed and awarded him damages. Against that decision the defendant appealed.

[10] In allowing the appeal, the Federal Court observed:

> In all the circumstances, on the evidence as it stands, it is clearly impossible to hold the defendant responsible for the prosecution *unless it was proved that whatever statements he made to the police were made without a belief in their truth for which he had reasonable and probable cause.*
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> (emphasis added)

[11] In *Rees & Others v. Commissioner of Police for the Metropolis* [2017] EWHC 273 (QB), the English Court of Appeal held that an individual or a group of individuals may be treated as the prosecutor for the purpose of the tort of malicious prosecution. The principles to be applied in determining whether a defendant or defendants will be held to be a prosecutor for the purpose of the tort of malicious prosecution were outlined as follows:

(i) they alone know the facts about the alleged offence;

(ii) they deliberately misstate the facts to the person who makes the decision to lay the charge and so start the criminal process;

(iii) they intend that there should be a prosecution;

(iv) the person who decides that the charge should be laid and prosecution brought cannot be expected to and does not form an independent judgment on the question whether or not a charge should be laid and if so which.

[12] It is clear from the cases discussed that a defendant who falsely, maliciously and without reasonable and probable cause makes a complaint to a police officer can be held to be the prosecutor for the purposes of a claim for malicious prosecution. In other words, if there is evidence the defendant was actively instrumental in putting the law in force, even if the Public Prosecutor is the prosecutor, the defendant can be held liable as the person responsible for bringing about the prosecution if his deception misleads the discretion of the nominal prosecutor.

[13] One further point merits consideration. The defendant argued that if a private person can be charged with responsibility for the initiation of proceedings by a public official, it would discourage victims of crime from lodging reports for fear of civil actions being instituted against them. In response, the plaintiff submitted that if the court yielded to the argument, it would mean that those who have been wronged by false reports will be without a remedy.

[14] In the English House of Lords case of *Martin v. Watson* [1995] 3 All ER 559, the same argument was advanced to defend an action for damages for malicious prosecution. There, the plaintiff was given an acquittal on a charge of indecent exposure brought by the police at the instigation of the defendant. In rejecting the argument, the House of Lords stated:

> Mr Munby QC for the defendant mounted a powerful argument to the effect that considerations of policy pointed against a decision in favour of the plaintiff in the present case. Such a decision, if it was maintained, would tend to discourage members of the public from bringing criminal activities to the notice of the police, lest they should find themselves harassed by actions of malicious prosecution in the event that the alleged perpetrator of the offence were acquitted. The logical result, if this argument were accepted, would be to stultify completely the tort of malicious prosecution since the rationale would apply not only to those giving information which resulted in a police prosecution but also to those who themselves signed the charge sheet or laid the information. There is no good ground here for making a distinction between persons who procure a police prosecution and those who are technically prosecutors. It is said that victims of sexual assaults would be particularly discouraged from complaining. This, however, could not be so where the alleged perpetrator was a stranger to the complainant, and where the parties are known to each other a prosecution is unlikely to follow unless there is some evidence other than that of the complainant herself. Further, false accusations of sexual offences are by no means unknown, and there are

> many other types of offences of which a person may be falsely accused. It is to be kept in mind also that in actions for malicious prosecution the onus lies on the plaintiff to prove malice and want of reasonable cause. This would not be possible in the case of genuine complaints. It is suggested that adequate remedies for false accusations are available by way of prosecution for attempting to pervert the course of justice or wasting the time of the police, and also by way of prosecution for perjury if the complainant has actually given false evidence. But none of these remedies affords any compensation to a person who may have been arrested and imprisoned and perhaps subjected to the ordeal of a trial.

[15] For these reasons, I agree with the Sessions Judge that the defendant's argument that the plaintiff's claim was bound to fail on this ground is baseless.

Whether The Proceedings Terminated In The Plaintiff's Favour

[16] It was common ground that the charge against the plaintiff was withdrawn and he was given a DNAA by the Selayang Magistrate's Court though his counsel had applied for an acquittal.

[17] It was the defendant's argument here and below that in order to succeed, the plaintiff must prove that the prosecution proceedings had terminated in his favour by an acquittal. It was said that as the plaintiff's claim was not terminated by an acquittal, it was bound to fail. The guilt or innocence of the plaintiff is yet to be determined. The plaintiff, it was submitted, could be recharged as the order of DNAA is not a final order that bars a subsequent prosecution on the same charge. The defendant cited *Learnergy Sdn Bhd v. Abdul Jalil Othman* [2018] 1 LNS 1055; [2019] 7 MLJ 348 in support of his proposition.

[18] Section 254 of the Criminal Procedure Code deals with the withdrawal of charges in a criminal court and is in these terms:

> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused should be stayed and the accused shall be discharged of and from the same.
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> (2) At any stage of any trial before a Sessions Court or a Magistrate's Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.
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> (3) Such discharge shall not amount to an acquittal unless the Court so directs.

[19] It is a well-established rule that the court would as a matter of practice grant an order of DNAA when the prosecution withdraws a charge or elects not to offer any further evidence in a criminal case before the commencement of the trial. It is only in exceptional cases an acquittal is ordered without hearing evidence. It is therefore not the fault of the plaintiff that he was given a DNAA.

[20] There are no reported Malaysian cases that have considered whether termination of proceedings by a DNAA is sufficient to establish that the proceedings have terminated in the plaintiff's favour. However, there are decisions from other jurisdictions that have considered the issue.

[21] In *Beckett v. New South Wales* [2013] 5 LRC 549, the appellant was tried and convicted for numerous offences and sentenced to 12 years and three months' imprisonment. An appeal to the New South Wales Court of Criminal Appeal was dismissed. In 2001, following a petition to the Governor by the appellant, the Attorney General referred the matter to the Court of Criminal Appeal which reheard the appeal, dismissed it in relation to two counts but upheld it and quashed the convictions in relation to six counts, in respect of which it entered an acquittal on one count ordered a new trial on the remaining five charges. In September 2005, the Director of Public Prosecutions directed that no further proceedings be taken against the appellant on all the outstanding charges and sent a letter to that effect to the Registry of the Court of Criminal Appeal. In August 2008, the appellant instituted proceedings against the State of New South Wales seeking damages for malicious prosecution based on the conduct of the police officers who had instigated the prosecution against her. The question of whether the proceedings against the appellant had been terminated in her favour was tried as a preliminary issue. The judge found that he was obliged to follow High Court of Australia's decision in *Davis v. Gell* which held that where proceedings terminated by entry of *nolle prosequi*, the plaintiff had to prove innocence to succeed in subsequent action for malicious prosecution.

[22] The appellant unsuccessfully appealed to the New South Wales Court of Appeal, but her appeal was allowed by the High Court of Australia. It was explained:

> Under the common law of Australia the guilt or innocence of a plaintiff was never an issue in the cause of action in malicious prosecution … The decision of the court in *Davis v. Gell* [1924] HCA 56, (1924) 35 CLR 275 that to succeed in an action for malicious prosecution, where the Crown proceedings had been terminated by a *nolle prosequi* entered by the Attorney General, the plaintiff had to prove his innocence, could not stand with subsequent authority and should not be followed. There was no principled reason to distinguish criminal proceedings terminated by a *nolle prosequi* entered by the Attorney General or by a direction of the DPP

> from other forms of termination falling short of acquittal. It followed that in pursuing her malicious prosecution claim the appellant did not need to prove her innocence of the offences for which she was prosecuted in 1991 …
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> The respondent's submission wrongly assumes that other forms of termination favourable to the plaintiff incorporate an element of 'merit assessment'. The termination of a prosecution may be for a technical reason that is unconnected to the strength of the prosecution case. The termination is nonetheless one favourable to the plaintiff such as to maintain the civil action (see *Wicks v. Fentham* (see 1791) 4 Term Rep 247). For example, the decision not to find a bill of indictment may be taken for reasons which are not connected to the strength of the prosecution case (see *Office of the DPP for New South Wales Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* [2007] pp 8-10, 13-14). The requirement that the plaintiff prove favourable termination, as earlier explained, is concerned with consistency of judicial decisions. Proof of favourable termination does not involve an inquiry into the underlying merits of the prosecution. The respondent was right to acknowledge in drafting the separate question that the prosecution had terminated in favour of the appellant.

[23] In my view, the foregoing is a sound and forceful statement of law. Applying that here, as the charge against the plaintiff was withdrawn and he was given a DNAA, this is sufficient to establish the element of the cause of action in malicious prosecution that requires prosecution proceedings to have terminated in the plaintiff's favour. I am in agreement with the Sessions Judge that the plaintiff in the circumstances ought to be allowed to maintain this action. It is improbable that the prosecution would have withdrawn the charge after having charged him in court without good reason.

Conclusion

[24] For all the reasons given, the appeal is dismissed, and the decision of the Sessions Judge is affirmed. Costs of RM2,000 to be borne and paid by the defendant to the plaintiff.